

STATE OF HAWAII
HAWAII LABOR RELATIONS BOARD

In the Matter of

MARIE C. LADERTA, Director, Department
of Human Resources Development, State of
Hawaii,

Petitioner.

CASE NO. RA-13-237

DECISION NO. 478

FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On July 20, 2010, Petitioner MARIE C. LADERTA, Director, Department of Human Resources Development, State of Hawaii (Petitioner or Laderta), by her representative, filed the instant petition with the Hawaii Labor Relations Board (Board). Petitioner alleged that Position No. 119505, Airports Administrator, located in Airports division of the Department of Transportation, State of Hawaii, will serve as the chief of the Airports Division and will administer the statewide airports programs, including formulating and executing policies and budget requirements; determining organizational, and other resource requirements, handling grievance and other employee-employer relations matters, as well as oversight of the \$2.3 billion multi-year airport modernization project currently underway. Petitioner alleged the position will manage a staff of approximately 1,200 employees and therefore seeks to exclude the position because it is a top-level managerial position and also performs work that deals with confidential matters affecting employee-employer relations. Petitioner also alleged that the Hawaii Government Employees Association, AFSCME, Local 152, AFL-CIO (HGEA) does not concur with the exclusion of the position.

On July 20, 2010, the Board issued a Notice of Receipt of Petition for Clarification or Amendment of Appropriate Bargaining Unit, Notice of Deadline for Filing Petitions for Intervention, setting August 2, 2010 as the deadline to file Petitions for Intervention in this proceeding. The Board did not receive any petitions to intervene in this proceeding.

Based upon a review of the petition, the Board makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. Laderta was for all relevant times, the Director of the Department of Human Resources Development, State of Hawaii, and represents the governor with

respect to State of Hawaii employees, and as such, is a public employer¹ as defined in Hawaii Revised Statutes (HRS) § 89-2, of the employees of the State, including the employees in bargaining unit 13.

2. The HGEA is the exclusive representative,² as defined in HRS § 89-2, of employees in bargaining unit 13. The HGEA did not file a petition to intervene in this proceeding.
3. According to the position description for the Airports Administrator, Airports Division, Department of Transportation, the position serves as the Administrator of the Airports Division and is responsible for the overall administration, management, operation, safety, security, acquisition, development, construction, financing, and maintenance of all State airports and aviation facilities and properties under the control of Department of Transportation's Airports Division; coordinates and plans for the development and improvement of aeronautics and aeronautical facilities and for the protection and promotion of safety and security in aeronautics; and directs the planning, construction and use of airport and aviation facilities in the public interest. The position will perform the following major duties in the approximate percentage of worktime:

¹HRS 89-2 provides in part as follows:

“Employer” or “public employer” means the governor in the case of the State, the respective mayors in the case of the counties, the chief justice of the supreme court in the case of the judiciary, the board of education in the case of the department of education; the board of regents in the case of the University of Hawaii, the Hawaii health systems corporation board in the case of the Hawaii health systems corporation, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the administrative director of the courts shall be the employer in lieu of the chief justice for purposes which the chief justice determines would be prudent or necessary to avoid contact.

²HRS 89-2 provides in part as follows:

“Exclusive representative” means the employee organization certified by the board under section 89-8 as the collective bargaining agent to represent all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.

A. Program Administration and Management Responsibilities (25%)

1. Responsible for the planning, organizing, directing, and coordinating of the management, financing, operation, development and maintenance of all airports and related facilities under the jurisdiction of the State of Hawaii.
2. Directs the development of strategic construction, financial, and/or security plans for major expansion and improvement programs of State airports and related facilities, and airport transportation services.
3. Directs the conduct of research and feasibility studies and the development and periodic review of short- and long-range program plans, goals, objectives and priorities.
4. Directs the development and execution of rules, policies and procedures to ensure efficiency and effectiveness of the division and compliance with pertinent laws, rules, regulations and departmental policies and procedures.
5. Interprets divisional policies and procedures and advises and directs the heads of the various branches and district and staff offices on administrative management and technical matters.
6. Develops legislation to advance the interests of the State in the field of air services and facilities. Presents testimony to the Legislature as necessary.
7. Advises and directs the branches and districts on administrative, management and technical matters; reviews reports from various branches and districts takes appropriate action or makes recommendations to the Director of Transportation.

8. Responsible for the development, review, and analysis of accurate revenue reports, budgets, work programs and operations, progress and costs; directs the inspection of construction work in progress, maintains facilities by reviewing, inspecting and/or approving maintenance procedures and operations.
9. Directs the development of a continuous Airport work program conforming to all State and Federal laws, rules, regulations and legal opinions pertaining thereto.
10. Directs the preparation of multi-year program financial plans and quarterly operating revenue forecasts.
11. Directs the development of the division's capital improvements program.
12. Directs the formulation of the division's operating and maintenance budget and resource allocation and expenditure plans.
13. Reviews recommended work projects and assigns priorities within the framework of approved Airports Division's capital improvements and operating budgets; and directs the preparation of the division's financial plan, and coordination with bond underwriter's for bond issuance.

B. Leadership and Supervision Responsibilities (20%)

1. Leads and supervises effectively by promoting commitment to the Airports Division. Provides guidance to subordinate managers and supervisors in the resolution of conflicts. Hears and resolves grievances and complaints.
2. Directs and assigns activities to accomplish projects/program goals. Mentors, guides, motivates, and oversees the activities of the

subordinate managers and supervisors with focus on projects/program issues.

3. Ensures program goals and objectives are carried out within available resources and within applicable laws, contract provisions, and policies and procedures. Takes appropriate action on divisional personnel matters including staffing allocation, disciplinary actions, grievances, and other issues involving collective bargaining contract provisions.

C. Relationships with Federal Agencies and Other Local Agencies (15%)

1. Maintains continuous liaison with Federal agencies, such as the Federal Administration Agency, Transportation Security Agency, Customs and Immigration.
2. Recommends and initiates requests for Federal airports studies and projects.
3. Establishes and maintains effective working relationships with government officials, airline industry representatives, private enterprises, organizations, and individuals concerned with airports activities and programs.
4. Establishes and maintains good public relations with various agencies, the public and legislators; appears before groups to explain and discuss issues, activities, programs, etc.

D. Representation (15%)

1. Represents the State of Hawaii Department of Transportation at conferences, public and legislative hearings.
2. Participates in the activities of the international, national, and regional organizations of airport authorities.

3. Confers with air cargo agents, tenants and concessionaires or their representatives on divisional matters such as rents and fees and the revision of rules and regulations.
4. Represents the State of Hawaii at various national, sectional, and local Airports and technical conferences and/or meetings concerned with the financing, construction, operation and development of Airports facilities to best serve the public interest, and, conducts such meetings and/or conferences as needed.
5. Represents the Department in financial matters, dealing with bond issuance, i.e., meeting with underwriters, bond counsel, rating agencies and issuers.

E. Civil Defense and Security Matters (20%)

1. Plans and develops emergency and security plans and procedures to prevent or minimize loss of capability of the Airports in any disaster.
2. Provides base support as directed and outlined in the Hawaii Emergency Transportation Plan in the Airports security plans.
3. Directs State Emergency and Defense Airport Transport System; directs the preparation of emergency and security plans for airport operations and coordinates such planning with the Federal Aviation Administration and Transportation Security Administration.
4. Develops security plans pursuant to Airport Security Requirements.
5. Directs the development and maintenance of, and ensures operational readiness to execute, safety, disaster/emergency response and security plans.

6. Represents the State of Hawaii in all meetings with officials of the Department of Homeland Security on matters of national security which involve the Airports Division.

F. Perform Other Duties as Assigned (5%)

Exhibit C.

4. According to the class specifications, the sole position in the class is responsible for the overall administration of all State airports and aviation facilities and properties under the control of the Department of Transportation's Airports Division. This class coordinates and plans for the development and improvement of aeronautics and aeronautical facilities and for the protection and promotion of safety and security in aeronautics, and directs the planning, construction and use of airport and aviation facilities in the public interest. Typically, the class develops and executes operational policies and procedures to ensure efficiency, safety and security in all district offices and directs the financial management, personnel, property management and methods, standards and evaluation functions; develops and directs major long-range airport planning and research studies.

Exhibit D.

5. By letter dated June 7, 2010, Laderta notified HGEA Executive Director Randy Perreira (Perreira) of the proposed exclusion of the Airports Administrator, ES-1, from bargaining unit 13 as a division chief, top-level managerial/administrative employee and confidential employee. On June 18, 2010, HGEA Deputy Director Nora A. Nomura (Nomura) indicated she did not concur with the proposed exclusion.

Exhibit A.

6. By letter dated June 21, 2010, Laderta sent a Second Request to Perreira seeking concurrence with the proposed exclusion of the Airports Administrator position. Laderta added a note that, "Position No. 6916 will be abolished effective July 1, 2010, pursuant to HB 2200 HD1 SD2 CD1 SLH 2010." On July 21, 2010, Nomura indicated that she did not concur with the exclusion.

Exhibit B.

7. The Board agrees with Laderta's Declaration, dated August 17, 2010, and finds that Position No. 119505, Airports Administrator, ES-1, should be

excluded from bargaining unit 13 as it reports to the Deputy Director of Airports and is the chief of the Airports Division, responsible to administer the statewide airports program, comprised of 15 airports on six islands with approximately 1,200 employees in six bargaining units represented by the HGEA, United Public Workers, AFSCME, Local 646, AFL-CIO, and the Hawaii Fire Fighters Association, IAFF. The position formulates and executes plans, priorities, goals, rules, policies and procedures; determines and executes budget requirements and expenditure plans; and determines the organization, staffing and other resource requirements. In addition, the position hears and resolves personnel matters, including staffing allocation, discipline, grievances and other issues involving the interpretation of collective bargaining contract provisions. As such, the position is a top-level managerial position and a confidential position which should be excluded from bargaining unit 13.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject petition pursuant to HRS § 89-6.
2. HRS § 89-6(g) provides, in part, as follows:

The following individuals shall not be included in any appropriate bargaining unit or be entitled to coverage under this chapter:

* * *

- (3) Top-level managerial and administrative personnel, including the department head, deputy or assistant to a department head, administrative officer, director, or chief of a state or county agency or major division, and legal counsel;

* * *

- (5) Individual concerned with confidential matters affecting employee-employer relations;

3. In interpreting the exclusionary language of HRS § 89-6, the Board, in various decisions, established criteria which must be met in order to justify an exclusion. In determining whether an individual occupies a top-level managerial or administrative position, the Board, in Decision No. 75, Hawaii Nurses Association, 1 HPERB 660 (1977), stated, in pertinent part:

This board believes that the proper test of whether an individual occupies a top-level managerial and administrative position includes measuring the duties of the position against the following criteria:

1. The level at and extent to which the individual exercises authority and judgment to direct employees, determine methods, means and personnel, by which the employer's operations are to be carried out; or
2. The extent to which the individual determines, formulates, and effectuates his employer's policies.

Id., at 666 [footnotes omitted].

4. In Decision No. 95, Hawaii Government Employees' Association, 2 HPERB 105 (1978), the Board supplemented this criteria by stating:

In order to be determined to be a top-level management or administrative position, a position must:

(1) be at or near the top of an on-going complex agency or program; or

(2) direct the work of a major program or an agency or a major subdivision thereof with considerable discretion to determine the means, methods, and personnel by which the agency or program policy is to be carried out; or

(3) operate in a management capacity in a geographically separated location, such as a Neighbor Island, and be responsible for representing management in dealing with a significant number of employees.

Id., at 143.

Because policy formulation is an important factor in the determination of managerial status, the meaning to be given to the term *policy* is important and warrants discussion.

The New York PERB, in a leading case of that Board, has defined the term *policy* which this Board adopts. The New York PERB stated in State of New York, 5 PERB 3001 (1972) at p. 3005:

We will first discuss the "policy" criterion and later the other three criteria. It would appear desirable to first consider the term "policy." Policy is defined in a general sense as "a definite course or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions." In government, policy would thus be the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the methods, means and extent of achieving such objectives.

The term "formulation" as used in the frame of reference of "managerial" would appear to include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. It would not appear to include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal. [Footnotes omitted.]

* * *

It is assumed that all persons in State government, except for elected officials, judges and certain other officers not here relevant, have supervision and that their decisions technically take the form of recommendations subject to approval by higher authority. It is the function of

a position, not its place on the organizational chart upon which top-level manager or administrator is based. "It is not whether a person definitely establishes policy but rather the individual's regular participation in the policy-making process which determines managerial status. Absolute discretion or authority to act is not a prerequisite to finding that an individual formulates policy. What matters is the fact of participation at a fundamental level in the decision making process, not the participant's batting average in having his views prevail." State of New York, supra.

Id., at 144-45.

4. In its interpretation of the legislative intent of the section regarding exclusion of individuals concerned with confidential matters affecting employee-employer relations, the Board, in Decision No. 95, Hawaii Government Employees' Association, 2 HPERB 105 (1978), stated:

Giving the subject statutory phrase its plain and ordinary meaning, the Board believes the Legislature intended to exclude from coverage of Chapter 89, HRS, those individuals who, in the regular course of their employment, are concerned with matters "not intended for the eyes or ears of the rank and file or their negotiating representative" affecting employee-employer relations. We are of the opinion that the confidential matters must directly produce an effect upon or influence or alter employee-employer relations. In almost all conceivable cases, such an employee, if he is not himself a policy maker in the field of employee-employer relations, will be a subordinate of a managerial individual who formulates policy which directly influences or affects changes in employee-employer relations or who meets other criteria of a top-level manager.

Id., at 146-47.

In defining what constituted confidential matters, affecting employee-employer relations, the Board noted:

As to the question of the secretness of the data, it should be noted that under our law supervisors may be included in units. Hence, confidential employees must know matters

pertaining to employee-employer relations which are not made known to included supervisors. Included supervisors may have authority to exercise independent judgment respecting hiring, transfers, suspensions, layoffs, recalls, promotions, discharges, assignments, rewards, discipline, grievance adjustments and still be includable. Thus, the material with which employees must be concerned in order to be considered confidential employees under Chapter 89, HRS, must be different than that which is known by supervisors concerning such aforementioned personnel matters...[Cite omitted.]

The Board is of the opinion that the term *employee-employer* relations includes collective bargaining (contract negotiations, application and administration) and all matters affecting employee-employer relations which are made non-negotiable by Subsection 89-9(d), HRS, but upon which the employer is required by Subsection 89-9(c), HRS, to consult with the unions. [Emphasis in original.]

Id., at 147.

As summarized in Decision No. 95, the following criteria must be met to designate an employee as confidential for exclusion pursuant to Subsection 89-6, HRS:

1. Working in the regular course of one's employment with matters
2. which are not intended for the eyes and ears of the rank and file and the unions
3. and which matters are capable of producing an affect or influence upon or change in employee-employer relations
4. such work normally being performed as a subordinate to an individual who is a managerial employee who formulates and effectuates management policy in the field of employment relations.

Id. at 147.

6. Based upon the record, the Board finds that Position No. 119505, Airports Administrator, ES-1, is the chief of the Airports Division and responsible to

administer the statewide airports program, comprised of 15 airports on six islands with approximately 1,200 employees in six bargaining units represented by the HGEA, United Public Workers, AFSCME, Local 646, AFL-CIO, and the Hawaii Fire Fighters Association, IAFF. The position formulates and executes plans, priorities, goals, rules, policies and procedures; determines and executes budget requirements and expenditure plans; and determines the organization, staffing and other resource requirements. As such, the position directs the work of the program with considerable discretion to determine the means, methods, and personnel by which the agency or program policy is to be carried out. The position has significant authority, latitude for individual initiative and independent judgment in the overall administration and operations management of the division. Based on the position's duties and responsibilities, the Board concludes that the position is a top-level managerial position and should be excluded from bargaining unit 13 and coverage under HRS Chapter 89.

7. In addition, the position hears and resolves personnel matters, including staffing allocation, discipline, grievances and other issues involving the interpretation of collective bargaining contract provisions. As such, these are matters capable of producing an effect or influence in employee-employer relations and are of a confidential nature and not intended for the eyes and ears of the union. Based on the position's duties and responsibilities, the Board further concludes that the position is also a confidential position and should be excluded from bargaining unit 13 and coverage under HRS Chapter 89.

ORDER

Position No. 119505, Airports Administrator, ES-1, is hereby excluded from collective bargaining unit 13 and the coverage of HRS Chapter 89 as a top-level managerial and confidential employee.

DATED: Honolulu, Hawaii, October 5, 2010.

HAWAII LABOR RELATIONS BOARD


JAMES B. NICHOLSON, Chair


SARAH R. HIRAKAMI, Member

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NORMAN K. KATO II, Member

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